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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

YOUNAN PROPERTIES, INC. et
al.,

Plaintiffs and Appellants,

v.

QUENTIN E. THOMPSON,

Defendant and Respondent.

B266507

(Los Angeles County
Super. Ct. No. BC590169)

APPEAL from an order of the Superior Court of Los Angeles County, Robert H. O'Brien, Judge. Affirmed.

Fayer Gipson, Gregory A. Fayer and Michelle K. Millard for Plaintiffs and Appellants.

The Graves Firm, Allen Graves and Jacqueline Treu for Defendant and Respondent.

Younan Properties, Inc., and Zaya S. Younan appeal from an order denying their request for a preliminary injunction to prevent respondent Quentin E. Thompson from violating the confidentiality and no-contact provisions of the parties' 2007 settlement agreement. Specifically, they argue the confidentiality provision does not authorize respondent's testimony pursuant to court order in a case pending in Texas. We conclude the trial court in this case did not abuse its discretion in declining to interfere with the discovery orders of the Texas court, based on the principle of comity and the lack of a showing appellants are likely to prevail on the merits. The order denying appellants' request for preliminary injunction is affirmed.

FACTUAL AND PROCEDURAL SUMMARY

Between 2004 and 2006, respondent was the chief financial officer of appellant Younan Properties, Inc., a real estate management company founded by appellant Younan in 2002. Respondent invested in several entities managed by appellants. Among those entities were the YPI Central Expressway Holding, L.P. and YPI Park Central Holding L.P. (hereafter, the Expressway and Park Central partnerships), which were formed to purchase properties in Dallas, Texas. In 2006, respondent sued appellants for violations of Business and Professions Code, section 17200, based on post-closing payments to Younan's personal account made in alleged violation of partnership agreements. Respondent also sued for wrongful discharge, alleging that

he had been terminated in retaliation for confronting Younan about the latter's illegal activities.

Respondent's lawsuit was settled in 2007, and the parties agreed to keep the settlement agreement, its terms, and the underlying allegations confidential, unless disclosure was "specifically permitted or required by law." In addition, respondent agreed not to contact, directly or indirectly, certain individuals and entities, including any investor of Younan Properties, Inc. The settlement agreement provides for injunctive relief in any court of competent jurisdiction to prevent violation of the confidentiality provision; all other disputes, including those over past violations of the confidentiality provision, are to be submitted to arbitration before a private judge in Los Angeles County. The settlement agreement also provides that the parties' rights and obligations under the agreement must be construed and enforced according to California law.

In 2014, several investors sued appellants and an additional entity, Younan Investment Properties, L.P., for fraud and breach of fiduciary duty with respect to six investments. The case was filed in Dallas County, Texas (hereafter, the Texas case).¹ Like respondent's earlier lawsuit, the Texas case contained allegations regarding

¹ Four of the investments related to properties in Dallas, Texas. Younan Properties, Inc., was alleged to have a principal office in Dallas, and Younan Investment Properties, L.P., was alleged to be a Texas limited partnership.

fraudulent transfers of fees in relation to properties purchased by the Expressway and Park Central partnerships.

In 2015, the plaintiffs in the Texas case subpoenaed respondent's deposition testimony. Appellants moved to quash the subpoena. On July 20, 2015, the Texas court declined to quash due to improper notice as it found respondent had agreed to appear despite any impropriety. The court reviewed the settlement agreement in camera and ruled that the plaintiffs were entitled to limited discovery regarding the two common investments they shared with respondent—the Expressway and Park Central partnerships. The court's written order restricted respondent's deposition to matters within his knowledge regarding investments he had in common with the plaintiffs in the Texas case and his knowledge regarding any investments those plaintiffs made with appellants. The court prohibited testimony regarding the resolution of respondent's lawsuit or his employment-related claims, "unless they pertain to blowing the whistle on illegal kickbacks" related to the common investments.

During his deposition in California on July 24, 2015, respondent refused to answer questions on advice of counsel and sought an additional order from the Texas court over the telephone. During the conference call, respondent's counsel represented that respondent could not answer deposition questions without a court order compelling his testimony

and defining its scope.² Appellants' Texas counsel took the position that the court's written order was more expansive than its oral ruling because it allowed questions about respondent's knowledge of investments he did not share with the plaintiffs in the Texas case. Appellants' California counsel took the position that respondent's deposition testimony would violate the confidentiality provision of the settlement agreement under California law. Counsel stated his belief that respondent's confidentiality obligation had not been before the Texas court in relation to the motion to quash. The Texas court responded: "That's correct. Only to the extent that I did review what was provided to me, and in spite of what was provided to me ruled that it was discoverable." The court gave the parties several options: proceed with the deposition, return to court for additional orders, or postpone the deposition for a couple of weeks to permit appellants' California counsel "to raise whatever issues out of their confidentiality need to be raised." Counsel agreed to reschedule the deposition for August 12, 2015. The Texas plaintiffs issued and served respondent with a subpoena to appear on that date.

On August 4, 2015, appellants filed the complaint in this case, seeking declaratory relief and a permanent injunction to prevent respondent's testimony and cooperation with the plaintiffs in the Texas case pursuant to

² Counsel represented that respondent was a Texas resident.

the confidentiality and no-contact provisions of the settlement agreement. Appellants requested a temporary restraining order along the same lines. The California court, Judge Robert H. O'Brien, denied the request, finding no imminent threat of irreparable harm and no likelihood of success on the merits, but issued an order to show cause regarding a preliminary injunction.

At a hearing on August 6, 2015, the Texas court ruled the new subpoena was valid. The court clarified that its original ruling allowing respondent's deposition to go forward was based on its interpretation of the language of the settlement agreement: either the settlement agreement was not enforceable, or if it were enforceable, the deposition was not a violation of the agreement. On August 12, 2015, the Texas court entered a new written order, requiring the deposition to proceed and respondent to answer questions limited to his knowledge about investments he had in common with the plaintiffs in the Texas case and his blowing the whistle on illegal kickbacks as to any such investment. The order included the following additional language: "The Court has reviewed the confidentiality provision of the Agreement and believes that the witness may testify without being in violation thereof because the Court does not believe that the Agreement itself is enforceable, or that even if it were enforceable, that that is a violation of the Agreement." Respondent was deposed on that date and answered questions that, according to appellants' counsel, concerned

matters subject to the confidentiality provision of the settlement agreement.

On August 25, 2015, the California court denied appellants' request for a preliminary injunction. On the record, Judge O'Brien explained that he denied the request "primarily on the grounds that I cannot conclude that you are likely to succeed in this case and also with respect to some comity, the way I interpret the Texas ruling has a significant [e]ffect on my decision." The court declined to "put[] the Court's imprimatur on the Texas ruling I'm just saying I'm reading it that there is a different thing going on down there, and I'm not going to interrupt that, but I'm making my ruling based on the papers we have here."

This appeal followed.³

³ Meanwhile, before the August 12, 2015 hearing in Texas, appellants filed a demand for arbitration with the American Arbitration Association. In September, respondent moved to compel arbitration and stay the declaratory and injunctive relief proceedings in the trial court. The California court, Judge Marc Marmaro, denied the motion to compel arbitration in part, as to the request for injunctive relief pursuant to the confidentiality provision of the settlement agreement; granted it in part, as to the request for injunctive relief pursuant to the no-contact provision and for declaratory relief; and stayed the case pending resolution of the arbitration.

DISCUSSION

Respondent argues that the appeal is moot because his deposition already has taken place. We may review moot issues if they are of broad public interest and likely to recur or cause another controversy among the parties. (*Epstein v. Superior Court* (2011) 193 Cal.App.4th 1405, 1411.) Although respondent believes he would not be compelled to testify at trial, appellants represent his testimony will likely be required in more than one related investor action in Texas. Assuming that any future elicitation of respondent's testimony pursuant to discovery orders of the Texas court will continue to implicate the principle of comity, we opt to review the order denying appellants' request for a preliminary injunction.

"A trial court deciding whether to issue a preliminary injunction weighs two interrelated factors—the likelihood the moving party will prevail on the merits at trial *and* the relative balance of interim harms that are likely to result from the granting or denial of preliminary injunctive relief. [Citations.] Generally, weighing these factors lies within the broad discretion of the superior court. [Citation.]" (*County of Kern v. T.C.E.F., Inc.* (2016) 246 Cal.App.4th 301, 315.) Here, the trial court declined to interfere in the Texas case based on the principle of comity. Application of that principle is discretionary and reviewed for abuse of discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 314; *Biosense Webster, Inc. v. Superior Court* (2006) 135 Cal.App.4th 827, 839.) Questions of law, such as the

meaning of a contract or a court order, are reviewed de novo. (*420 Caregivers, LLC v. City of Los Angeles* (2012) 219 Cal.App.4th 1316, 1331; *Morgan v. City of Los Angeles Bd. of Pension Comrs.* (2000) 85 Cal.App.4th 836, 843; *People v. Landon White Bail Bonds* (1991) 234 Cal.App.3d 66, 76.)

Appellants argue the principle of comity has no application in this case because the Texas court did not rule on the scope of respondent's confidentiality obligations under the settlement agreement. The argument is not well taken. With respect to the contention that the record does not show they briefed the enforceability or scope of the confidentiality provision of the settlement agreement in their motion to quash, it is appellants' burden to provide an adequate record on appeal. Neither the motion to quash nor a complete transcript of the hearing on that motion is in the record, making it difficult to ascertain the precise nature of appellants' arguments in the Texas court. (See *Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 187 [if record of issue inadequate, issue resolved against appellant].)

Regardless, the partial reporter's transcript indicates the Texas court ordered appellants to produce "the provisions on which they [were] relying for confidentiality objections to the deposition." It then reviewed the settlement agreement in camera and ruled that the plaintiffs in the Texas case were entitled to discover matters relevant to that case, even though such matters were also subject to the confidentiality provision of the settlement agreement.

The court restated its ruling during the telephone conference on July 24, 2015, when it explained that respondent's confidentiality obligation was before it "[o]nly to the extent that I did review what was provided to me, and in spite of what was provided to me ruled that it was discoverable." In its August 12, 2015 order, the court further clarified the reasoning behind its discovery order—that the confidentiality provision was either unenforceable or did not preclude respondent's deposition testimony.

The Texas court's statements suggest appellants raised the confidentiality provision as a bar to the discoverability of respondent's testimony. In ruling that testimony was discoverable to the extent it was relevant to the case pending before it, the Texas court necessarily rejected appellants' argument that the confidentiality provision absolutely barred its discovery. Appellants' principal argument in this case is that something more than relevance to the issues in a lawsuit is required for confidential information to be discoverable under *Hinshaw, Winkler, Draa, Marsh & Still v. Superior Court* (1996) 51 Cal.App.4th 233 (*Hinshaw*). Whether or not the Texas court's discovery rulings are correct under *Hinshaw*, it is those rulings and the ensuing orders requiring disclosure of confidential information that appellants effectively challenge in their request for preliminary injunction.

Appellants' argument that the Texas court could not rule on the confidentiality provision because the settlement agreement has a forum selection or "choice of venue" clause

also is not well taken. The settlement agreement is subject to California law, but injunctive relief to prevent violations of the confidentiality provision may be sought, without limitation, “in any court of competent jurisdiction.” All other disputes, with the express exception for any request for injunctive relief, are subject to arbitration in California. The Texas court had subject matter jurisdiction over the case pending before it, and appellants brought the motion to quash the subpoena in that case. Nothing in the settlement agreement prevented them from seeking injunctive relief from that court, and there is no indication they sought a formal stay in that case in order to litigate or arbitrate in California.⁴

Appellants claim there is no danger of conflicting rulings because the Texas court made no actual or binding ruling on the issue of confidentiality. They point to the court’s disclaimers that “in spite of my order denying the motion to quash . . . , which I hereby make, I can’t speak to what any court in California might do. Clearly, I have no control over that situation,” and “I am fully aware that

⁴ Nor is there any authority for the proposition that an arbitration agreement deprives a court of authority to exercise discretion whether to enforce the agreement. (See e.g. *Mercury Ins. Group v. Superior Court* (1998) 19 Cal.4th 332, 348, citing Code Civ. Proc. § 1281. 2, subd. (c) [under California law, contractual arbitration “may have to yield if there is an issue of law or fact common to the arbitration and a pending action or proceeding with a third party and there is a possibility of conflicting rulings thereon”].)

whatever I say in terms of ordering him to testify or not is subject to review or whatever other forms of action the California court might take, so whatever ruling I'm making here is based solely on what I can rule on." But these disclaimers do not change the fact that the Texas court expressly ordered respondent to answer deposition questions on matters subject to the confidentiality provision of the settlement agreement. Appellants' request for injunctive relief in this case, had it been granted, would have resulted in an order prohibiting respondent from answering such questions and would have directly contradicted the order of the Texas court. Principles of comity are necessarily at play in this situation since respondent would have been subject to conflicting orders by trial courts of different jurisdictions, even if the Texas court's order is not technically final.

Comity, in the sense of courtesy, is sometimes used to explain the reason for the general rule in California that one trial court judge may not reconsider and overrule an interim ruling of another trial court judge, unless the latter is unavailable. (*Ziller Electronics Lab GmbH v. Superior Court* (1988) 206 Cal.App.3d 1222, 1232.) The rule is premised on important public policy considerations. "For one [trial] court judge, no matter how well intended, even if correct as a matter of law, to nullify a duly made, erroneous ruling of another [trial] court judge places the second judge in the role of a one-judge appellate court." (*People v. Riva* (2003) 112 Cal.App.4th 981, 991, fn. omitted.) Under this rule, had one California trial judge ordered or permitted respondent to

answer questions at his deposition on matters it ruled discoverable, another California trial judge would have been constrained by comity from enjoining respondent and in effect reconsidering the first judge's ruling.

More typically, the principle of comity applies between courts of different jurisdictions, such as a California court and the court of a sister state. As the court explained in *Advanced Bionics Corp. v. Medtronic, Inc.* (2002) 29 Cal.4th 697, 707, where cases involving the same subject matter are pending in different states, comity means courtesy to the law of a sister state. “[J]udicial restraint takes on a more fundamental importance” in that situation because of the danger of “conflicts and reciprocal interference with jurisdiction” and the “respect and deference owed to independent foreign proceedings.” (*Id.* at pp. 705–706.) Appellants argue *Advanced Bionics* is inapposite because it is an antisuit injunction case, and appellants do not seek to enjoin the Texas case entirely. Nevertheless, their request for injunctive relief raises comity concerns. According to appellants’ California counsel, the plaintiffs in the Texas case, none of whom is a party to this case, subpoenaed respondent’s testimony because they considered him their “star witness.” The Texas court, which has jurisdiction over the Texas case, ruled on the discoverability of the information the plaintiffs in that case sought to elicit. While an injunction in this case would operate only against respondent, it would effectively restrict the right of non-parties to discovery in the Texas case and would effectively

interfere with the Texas court's jurisdiction. (Cf. *TSMC North America v. Semiconductor Manufacturing Interant. Corp.* (2008) 161 Cal.App.4th 581, 590, citing *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren* (1st Cir. 2004) 361 F.3d 11, 17 [although international antisuit injunction operates only against parties, it effectively restricts foreign court's jurisdiction].)

“[E]njoining proceedings in another state requires an exceptional circumstance that outweighs the threat to judicial restraint and comity principles.” (*Advanced Bionics Corp. v. Medtronic, Inc.*, *supra*, 29 Cal.4th at p. 708.) That foreign proceedings may conflict with California public policy is not enough. (*Id.* at p. 707) Appellants have shown no exceptional circumstance requiring California courts to interfere with the discovery orders of the Texas court.

Nor have they shown they are likely to succeed on the merits under California law. Neither *Hinshaw*, *supra*, 51 Cal.App.4th 233, nor *Gilbert v. National Corp. for Housing Partnerships* (1999) 71 Cal.App.4th 1240 (*Gilbert*), on which appellants primarily rely, stands for the proposition that a confidentiality provision may absolutely bar court-ordered discovery of relevant information.

Hinshaw, *supra*, 51 Cal.App.4th 233, a legal malpractice case, dealt with third-party privacy rights as to the amount of payment under a confidential settlement agreement. The court explained that the constitutional right to privacy may be abrogated only by a “compelling” state interest, and disclosure of third-party private information is

not justified “‘simply because inadmissible, and irrelevant, matter sought to be discovered *might* lead to other, and relevant, evidence.’ [Citation.]” (*Id.* at p. 239.) The court held the settlement agreement of non-parties was not discoverable because its amount was not relevant to the value of the plaintiffs’ lost claims. (*Id.* at p. 238.) It distinguished *Norton v. Superior Court* (1994) 24 Cal.App.4th 1750, 1760, where a request to discover the plaintiffs’ own settlement with an insurance company did not infringe on third-party privacy interests and was directly relevant to the value of the plaintiffs’ lost claims. (*Hinshaw*, at p. 238.)

Hinshaw, *supra*, 51 Cal.App.4th 233 is inapposite because appellants are parties to the Texas case and, hence, have no protectable third-party privacy interest for purposes of the Texas court’s discovery orders. In any event, the Texas court’s August 12, 2015 order clearly limited respondent’s deposition testimony to the only two investments he shared with the Texas plaintiffs, which that court considered relevant to the case pending before it. To the extent appellants read *Hinshaw* as preventing disclosure of relevant information, they are mistaken.

Appellants’ reliance on *Gilbert*, *supra*, 71 Cal.App.4th 1240, an attorney disqualification case, also is misplaced. The court in that case was concerned that an attorney who negotiated a confidential settlement agreement on behalf of some employees against an employer could not adequately represent another employee in a similar case, where the

employee wanted the attorney's other clients to testify in her own case, even though they risked breaching the settlement agreement. (*Id.* at p. 1254.)

As noted in *McPhearson v. Michaels Co.* (2002) 96 Cal.App.4th 843, 848, the court in *Gilbert, supra*, 71 Cal.App.4th 1240 overstated the potential conflict of interest created by the confidentiality clause at issue. That clause did not and could not preclude the settling employees from testifying as percipient witnesses to any events relating to the plaintiff's case because "it would be contrary to public policy to permit a party to litigation to dissuade or otherwise influence the testimony of a percipient witness through a private agreement." (*McPhearson*, at p. 848, citing Evid. Code, § 911 [unless otherwise provided, no privilege to refuse to disclose matter or insist that another person not disclose matter].)

Similarly, here, the confidentiality provision may not prevent respondent from answering questions as a percipient witness of any fraudulent transfers with regard to the Expressway and Park Central partnerships. In fact, the provision specifically carves out an exception for disclosures permitted or required by law.

The trial court did not abuse its discretion in denying a preliminary injunction to prevent respondent's testimony as ordered by the Texas court. Appellants' view of the merits of the plaintiffs' allegations in the Texas case and their defenses to those claims are irrelevant to the issue before us, and we express no opinion about them. Nor do we express

an opinion regarding the mutual accusations of other breaches of the settlement agreement, such as appellants' belief that respondent may have provided information to the plaintiffs in the Texas case outside his deposition, or respondent's claim that, in court filings, appellants themselves disclosed information subject to the confidentiality provision.

Respondent's request for attorney fees under Civil Code section 1717 is not properly before us. It was not presented in the trial court and is premature in any event. An order granting or denying a preliminary injunction does not finally decide the merits of the parties' dispute. (*Jomicra, Inc. v. California Mobile Home Dealers Assn.* (1970) 12 Cal.App.3d 396, 402.) While the case for injunctive and declaratory relief has been stayed pending arbitration, it has not been finally resolved. (See *Profit Concepts Management, Inc. v. Griffith* (2008) 162 Cal.App.4th 950, 956.) We also decline respondent's request for sanctions under Code of Civil procedure section 907, as we cannot say that the appeal was brought in bad faith.

DISPOSITION

The order is affirmed. Respondent is to have his costs on appeal.

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EPSTEIN, P. J.

We concur:

MANELLA, J.

COLLINS, J.